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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 959

VAN CAMP SEA FOOD CO., INC. (a corporation), and ANTONIO FRANCISCO,
Petitioners,

vs.

ROBERT A. NORDYKE,
Respondent.

BRIEF FOR RESPONDENT
in Opposition to Petition for a Writ of Certiorari.

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ROBERT A. NORDYKE,
Respondent.

BRIEF FOR RESPONDENT
in Opposition to Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

Respondent Robert Nordyke entered the employ of petitioners on August 1, 1941 as a radio-operator fisherman aboard their fishing vessel the "Madereinse" for a tuna fishing expedition in Central American Pacific waters.

On September 14, 1941 while engaged in fishing he was injured when "a tuna hit the line it threw my arm up against the rail". (R. p. 47.) Respondent's injury

was a fracture of his right wrist and unquestionably suffered "in the service of the ship" as that term is used and understood.

Aguilar v. Standard Oil Co. (1943), 318 U. S. 724, 87 L. Ed. 1107, 63 S. Ct. 930, 1943 A.M.C. 451;

O'Donnell v. Great Lakes Dredge & Dock Co. (1943), 318 U. S. 36, 87 L. Ed. 596, 63 S. Ct. 488, 1943 A.M.C. 149;

Sundberg v. Washington Fish & Oyster Co. (C.C.A. 9, 1943), 138 Fed. (2d) 801.

Respondent reported the injury at once to the master. There were no doctor or medical facilities aboard other than some insignificant first aid supplies. The master jerked at the wrist but didn't help it. It could well be found that such attempted treatment made the wrist worse. Respondent was in great pain, which fact was communicated to the master.

Respondent radioed the United States Marine Hospital at San Francisco a description of the injury and asked for advice. The hospital radioed the master that the description was that of an imperfect broken wrist bone, gave instructions for treatment, and advised the master to "make for the nearest port for X-ray and *proper medical care*". (R. p. 55.) Respondent read and handed the message to the master. The hospital's instructions were a statement of the law of the sea, and if the master did not know previously what he should do, he was told. The master denied receiving such a telegram (R. p. 205) although it is listed on the ship's log in an exhibit offered for identi-

fication by petitioners themselves. (R. p. 90.) The jury obviously did not believe the master.

Despite the fact that respondent was badly hurt and in obvious pain, and there were no means to give medical care and treatment aboard (and no treatment was given), the petitioners' vessel continued to fish for two days before attempting to get medical care and attention for respondent. The vessel then went to San Cristobal, Ecuador, where it had to go anyhow for inspection. (R. p. 207.) There respondent saw a doctor who said the wrist was broken but said he did not have facilities to take care of respondent and advised the master who was present to take respondent "somewhere immediately where there was an X-ray where respondent could get medical attention". (R. p. 59.) The master failed to follow this advice or to get proper medical attention for respondent.

The vessel continued to fish, and several days later came upon an American destroyer. The pharmacist's mate of that vessel came aboard the fishing boat and looked at respondent's wrist, told respondent and the master that it was broken, and told the master to take respondent to Panama or some near port for medical care and attention, and that if the wrist were not attended to for about two weeks it would set and cause further complications. (R. pp. 62-64.)

The master asked the destroyer whether they would take respondent to Panama, but the destroyer could not do so. Apparently Captain Francisco recognized his duty, even if he would not perform it. The master

failed to follow the pharmacist mate's advice, or to get care and proper medical attention for respondent.

On October 10, 1941 the fishing boat reached San Diego. Respondent there went to the Marine Hospital where he found the doctors unable to treat him for several days (R. pp. 154-156) so he went to his home in San Jose where he obtained proper medical care and treatment for the first time. A full month had elapsed from the time of the injury until respondent obtained proper medical care and treatment, and then he obtained it at his own initiative and expense. But the damage was done, and a part of the bone in respondent's right wrist had to be removed with consequent serious limitation of motion in and permanent disability to respondent's wrist. (R. pp. 109-110.) Petitioners' failure to provide respondent with proper medical care caused the result which occurred.

Respondent subsequently brought an action against petitioners in the United States District Court for the Southern District of California, Central Division. Respondent's case was based on the Jones Act (§33 of the Act of June 5, 1920, 41 Stat. 1007, 46 U.S.C.A. §688) and was stated in two counts: the first, for compensatory damages based on petitioners' negligent failure to provide respondent with proper medical care and attention thereby causing him to suffer personal injury, namely, a permanent disability and added pain and suffering; and the second, for maintenance, cure and wages.

Respondent proved his case to the jury's satisfaction which returned a verdict in his favor for $3750.00

on the first cause of action, and $440.00 on the second cause of action. (R. p. 13.) Petitioners appealed to the United States Circuit Court for the Ninth Circuit which found the verdict and judgment entered thereon proper, supported by the law and the evidence, and affirmed. (R. pp. 236-253.)

Petitioners now seek certiorari.

ARGUMENT.

I.

THE QUESTION OF FEDERAL LAW INVOLVED IN THIS CASE HAS BEEN SETTLED HERETOFORE BY THIS COURT, AND THE DECISION OF THE CIRCUIT COURT OF APPEALS FOLLOWS AND APPLIES THE DECISIONS OF THIS COURT.

The question involved is whether the failure of a shipowner to furnish proper medical care to a seaman injured in the service of its ship gives rise to an action for compensatory damages under the Jones Act.

That question has been twice answered affirmatively in Jones Act cases,

Cortes v. Baltimore Insular Lines (1932), 287 U. S. 367, 77 L. Ed. 368, 53 S. Ct. 173;

DeZon v. American President Lines (1943), 318 U. S. 660, 87 L. Ed. 1065, 63 S. Ct. 814, 1943 A.M.C. 483;

and years before that in the same way under the general maritime law in

The Iroquois (1904), 194 U. S. 240, 48 L. Ed. 955, 24 S. Ct. 640.

Petitioners argue that there is no duty on the part of a shipowner to furnish *proper* medical care to a seaman injured in the service of its ship and that the cases just cited do not lay down the principles which respondent asserts.

Respondent, of course, contends that petitioners' position in each respect is wrong. A review of the applicable decisions support respondent's contentions.

Even before the passage of the Jones Act, and for hundreds of years, it has been the law of the sea that a seaman injured in the service of a vessel must be cured at the vessel's expense, and that where a seaman is sick or hurt, and the circumstances of the case require it, a vessel must put in to the nearest port where medical attention can be had, or take other means even at the cost of a week's delay to get medical attention for the seaman.

The Iroquois, supra;

The Osceola (1903), 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483;

Harden v. Gordon (1823), 2 Mason 541, 11 Fed. Cas. No. 6047;

Reed v. Canfield (1832), 1 Sumn. 195, 20 Fed. Cas. No. 11641;

Unica v. United States (U.S.D.C., Ala., 1923), 1923 A.M.C. 455;

Persson v. Gulf Refining Co. (N.Y., 1930), 1934 A.M.C. 559.

The duty to provide proper medical care imposed under the old maritime law has been carried over to the administration of the Jones Act, and failure to

render proper medical care resulting in injury to a seaman is a personal injury under the act giving rise to an action for damages.

Cortes v. Baltimore Insular Lines, Inc., supra;
DeZon v. American President Lines, supra;
Anelich v. "The Arizona" (1935), 183 Wash. 467, 49 Pac. (2d) 3, 1935 A.M.C. 1332 (affirmed 298 U. S. 110, 80 L. Ed. 1075, 56 S. Ct. 707);
Nicolaisen v. Swayne & Holt, Ltd. (C.C.A. 5, 1934), 70 Fed. (2d) 602;
Cf. *Aguilar v. Standard Oil Co., supra.*

Nor need a seaman request medical care in order to receive it.

Nahmeh v. United States (U.S.D.C., N.Y., 1926), 1926 A.M.C. 1150.

The applicable principles on medical care have been most recently enunciated by this Court in the *DeZon* case, *supra,* 318 U. S. at page 667:

" 'The duty to provide *proper medical treatment and attendance* for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations.' *The Iroquois,* 194 U. S. 240, 241-242. When a seaman becomes committed to the service of a ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault. *It is no merely formal obligation and it admits of no merely perfunctory discharge.*

> Its measure depends upon the circumstances of each case—the seriousness of the injury or illness and the availability of aid. *Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting into the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages.*" (Italics ours.)

In the cited case, this Court held that the negligence of a ship's doctor in treating an injured seaman was actionable against the shipowner under the Jones Act.

And in the leading case of *Cortes v. Baltimore Insular Lines, supra,* the rule is declared, 287 U. S. at page 371:

> "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury done him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt."
>
> Cf. *"The Korea Maru"* (C.C.A. 9, 1918), 254 Fed. 398.

Contrary to petitioners' assertions, in both the *DeZon* and *Cortes* cases, *supra,* the seamen were injured while in the service of their respective ships, and the principles enunciated by this Court in those cases were obviously based on such facts. In the *DeZon* case, the seaman was injured by getting a chip

of paint in his eye while working in the engine room of the vessel, and contended that he lost the sight of his eye because the ship's doctor failed to leave him at Honolulu where the ship was at the time in order to get proper medical attention which was available there but not on the ship. The seaman claimed that failure to provide such proper medical care resulting in the loss of the eye was a personal injury within the contemplation of the Jones Act. This Court agreed with this principle of law.

In the *Cortes* case, *supra,* the seaman contracted pneumonia while in the ship's service, and his administrator contended that the seaman's subsequent death from pneumonia resulted from the shipowner's failure to provide proper medical care, a personal injury under the Jones Act.

In both of these cases this Court held that the failure to render medical care resulting in injury to the seaman was a personal injury within the meaning of the Jones Act. These decisions were in line with that in *The Iroquois, supra,* where the master of the vessel unduly delayed getting a seaman who broke his leg in the ship's service to a port for medical treatment with the result that the seaman's leg had to be amputated, a personal injury in the eyes of the general maritime law.

It follows that the question which petitioners contend has not been decided by this Court has, in fact, been decided several times (unfavorably to petitioners' views) and the Circuit Court has followed those decisions.

Not content with its unwillingness to accept the law on the point just discussed, petitioners next want this Court to review and change the decisions which give to seamen two independent and cumulative rights, one for compensatory damages where there is negligence (under the Jones Act) and another for maintenance, wages, and cure (under the general maritime law). There is nothing inconsistent or allowing a double recovery in these rights, despite petitioners' claim that the seaman must be required to make an *election*. There is a difference between a double *recovery* and a double *remedy*. Existence of the latter does not of itself allow the former.

The Jones Act right is based on negligence. The damages that may be awarded are those commonly recognized as recoverable in a negligence case, and include general damages for the hurt, and special damages for actual wages lost, medical expenses incurred, and so forth.

The other right a seaman has is to recover maintenance, wages (until the end of the voyage) and cure where he is injured in the ship's service, even though there is no negligence. This is the rule of *The Osceola, supra*. An action for damages under the Jones Act would not necessarily include these latter items (although it could), and a maintenance, wages, and cure recovery would certainly not include a recovery of damages.

The late Justice Cardozo ably explained the point which troubles petitioners in the *Cortes* case, *supra*, 287 U. S. at pages 374-375:

"While the seaman was still alive, his cause of action for personal injury created by the statute (Jones Act) may have *overlapped* his cause of action for breach of the maritime duty of maintenance and cure, just as it may have *overlapped* his cause of action for injury caused through an unseaworthy ship. (Citing cases.) *In such circumstances it was his privilege, insofar as the causes of action covered the same ground, to sue indifferently on any one of them. The overlapping is no reason for denying to the words of the statute the breadth of meaning and operation that would normally belong to them,* at all events when a consequence of the denial is to withhold any remedy whatever from dependent next of kin. A double remedy during life is not without a rational office if the effect of the duplication is to carry the remedy forward for others after death. The argument for the respondent imputes to the lawmakers a subtlety of discrimination which they would probably disclaim." (Our emphasis.)

These comments are peculiarly appropriate to the argument of petitioners here which is reminiscent of respondent's argument in the *Cortes* case.

The election that petitioners speak about which a seaman must make is between his Jones Act action based on negligence, and his maritime action based on unseaworthiness. There he must choose which course he will pursue to recover *damages*, but whichever he chooses, he has his independent and cumulative right to maintenance, wages and cure. These principles are so well settled and commonly accepted and in accord with the traditionally liberal view entertained toward

seamen that they certainly should not serve as a basis for certiorari in this case.

Pacific S. S. Co. v. Peterson (1928), 278 U. S. 130, 73 L. Ed. 220, 49 S. Ct. 75, 1928 A.M.C. 1932.

This Court said, 278 U. S. page 137:

"Claims for maintenance, cure and wages, and for indemnity for injuries occasioned by unseaworthiness, may be demanded and recovered in the same proceeding."

"Thus the election required by the Jones Act was whether a seaman would proceed under the old admiralty remedy for unseaworthiness, or under the new rules for negligence. In any event, he could join his claim for maintenance, cure and wages with his action for compensatory damages. That is what plaintiff has done in this case."

And that is what plaintiff-respondent has done in this case. Respondent made no double recovery, nor does he propose to. He joined all his rights in one action, and made one recovery under the rule of the *Peterson* case, just cited, and the *Cortes* case, *supra.* Petitioners' statements concerning the fact that the Government is operating numerous vessels and seamen injured may bring suits for maintenance and damages separately and the Government wants to know whether they can do this are inappropriate here. While petitioners' solicitude for the Government may be appreciated, those issues are not presented nor the parties before the Court in this case. The questions of what rights an injured seaman has to damages and mainte-

nance, and what election he is required to make, have long since been decided by this Court, and have been followed by State and Federal Courts alike throughout the country. Nor have petitioners shown any reason for a reexamination or reconsideration of those decisions.

Finally, petitioners' point that this Court should grant certiorari to determine whether a fisherman is a seaman within the meaning of the Jones Act is without merit. That a fisherman is a seaman within the Jones Act has been the accepted rule for years,

Nolan v. General Seafoods Corp. (C.C.A. 1, 1940), 112 Fed. (2d) 515;

Sundberg v. Washington Fish & Oyster Co., supra;

Osland v. Star Fish & Oyster Co. (C.C.A. 5, 1939), 107 Fed. (2d) 113, 1940 A.M.C. 127.

A longshoreman engaged in work in connection with a vessel has been held by this Court to be a seaman within the meaning of the Jones Act,

International Stevedoring Co. v. Haverty (1926), 272 U. S. 50, 71 L. Ed. 157, 47 S. Ct. 19.

In the *O'Donnell* case, *supra*, this Court said:

"The term 'seaman' has been interpreted to embrace those employed on a vessel in rendering services customarily performed by seamen."

Cf. *Norton v. Warner Co.* (October Term 1943, No. 362), ... U. S. .....

Fishermen, besides fishing, take the vessel to the fishing grounds and return. They do all those things necessary to the navigation and preservation of the vessel. They are the "seamen" of the fishing vessel. They are so commonly accepted as seamen that the argument made by petitioners that they are not is rarely, if ever, made. Furthermore, the evidence here shows that respondent and all the other fishermen of the "Madereinse" were seamen.

A thorough examination of the record and the petition establishes the fact that there is no undecided question presented to this Court, nor is this case one which calls for a review or reconsideration of any decisions of this Court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Respondents argue that the Jones Act is merely a *venue* statute. While the act provides for venue by requiring the action to be brought in the Court of the district wherein the employer resides or has his principal office, it also is a statute granting jurisdiction to both Federal Courts and State Courts to entertain seamen's cases based on negligence, and neither diversity of citizenship nor jurisdictional amount is requisite in the Federal Courts. The only requirement is that the case be one where a seaman has been in-

jured in the service of his ship as a result of his employer's negligence.

The cases cited by respondent are not inconsistent with these principles or the decision of the Circuit Court.

Panama R. Co. v. Johnson (1924), 264 U. S. 375, 68 L. Ed. 748, 44 S. Ct. 391;

Engel v. Davenport (1926), 271 U. S. 33, 70 L. Ed. 813, 46 S. Ct. 410.

In the *Panama R. Co.* case, *supra,* the Court said: "The cases *arose under a law of the United States* and involved the requisite amount, *if any was requisite.*" (Our emphasis.)

That should calm petitioners' fears that a seaman might bring an action for $5.00 in a Federal Court and be entitled to a jury trial paid for with taxpayers' money. The United States has apparently not been worrying about being taken advantage of by seamen, as witness the fact that a seaman may maintain an action and prosecute an appeal in the Federal Courts without prepayment of costs or fees, or giving security therefor, 28 U.S.C.A., Sec. 837. (Act of June 12, 1917, ch. 27, Sec. 7, 40 Stat. 157; Act of July 1, 1918, ch. 113, Sec. 1, 40 Stat. 683.)

Petitioners forget that jurisdiction has two aspects, one being venue, for which the Jones Act provides, and the other being the power of the Court to entertain a particular action, for which the Jones Act also provides. The power of the Federal Courts to entertain a Jones Act case is not dependent on diversity of citizen-

ship or jurisdictional amount, but is a case arising under a statute of the United States.

O'Donnell v. Great Lakes Dredge & Dock Co., supra;

Panama R. Co. v. Johnson, supra.

III.

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED CONTRARY TO ITS EARLIER DECISION ON JURISDICTION WITH REGARD TO THE SECOND CAUSE OF ACTION.

Petitioners contend that because the demand in the second cause of action was not in excess of $3000.00, and there was no diversity of citizenship, that the District Court lacked jurisdiction of the maintenance, wages, and cure count, and cite *Modin v. Matson Navigation Co.* (C.C.A. 9, 1942), 128 Fed. (2d) 194, 1942 A.M.C. 961, as authority. The cited case merely held that where the negligence part of the case had been dismissed, the maintenance cause was properly transferred to the *admiralty* side.

In our case, the negligence cause remained throughout, and the maintenance cause was properly joined. It is incidental to, and connected with the negligence cause. The cases are legion which hold that a maintenance cause can be *separately* brought, or *joined* with a Jones Act case, and the *law* side of the District Court has jurisdiction.

Pacific S. S. Co. v. Peterson (1928), 278 U. S. 130, 73 L. Ed. 220, 49 S. Ct. 75, 1928 A.M.C. 1932.

The same rule is declared in

Nolan v. General Seafoods Corp., 112 Fed. (2d) 515, 517,

"In the case at bar, the plaintiff elected to sue under the Jones Act for negligence with an added count for maintenance and cure on account of injuries received in the service of the ship, *which count may properly be joined with one under the Jones Act.*"

The same rule is stated in

Stevens v. R. O'Brien & Co. (C.C.A. 1, 1923), 62 Fed. (2d) 632, 633,

"Under a second count the appellant seeks to recover for maintenance and cure which may be joined with a count for negligence under section 33 of the Merchant Marine (Jones) Act."

It was held in

Smith v. Lykes Bros.-Ripley S. S. Co., Inc. (C.C.A. 5, 1939), 105 Fed. (2d) 604, 1939 A.M.C. 604,

that a seaman might recover for damages under the Jones Act and bring a later action for maintenance and cure, or might join both counts in the same action.

The following cases hold that a cause for compensatory damages may be joined with a cause for maintenance, wages and cure:

Kongs v. Oceanic & Oriental Nav. Co. (D.C. Cal., 1931), 47 Fed. (2d) 650, 1931 A.M.C. 674;

Owens v. Hammond Lumber Co. (D.C. Cal., 1934), 8 Fed. Supp. 392;

"The S. S. Magdapur" (D.C. N.Y., 1933), 3 Fed. Supp. 971;

Oceanic Fisheries Co. v. U. S. F. & G. Co. (1941), 9 Wash. (2d) 484, 115 Pac. (2d) 714;

Flynn v. Panama R. Co. (N.Y., 1923), 201 N. Y. S. 56, 121 Misc. Rep. 239.

Inherent in

O'Donnell v. Great Lakes Dredge & Dock Co., supra,

is recognition of the principle that a cause under the Jones Act for compensatory damages may be joined with a count for maintenance and cure.

It is clear from the cited cases that it was quite proper for respondent to join his separate rights in one action under the Jones Act. The District Court, having jurisdiction of the damage aspect of the case on its law side, had jurisdiction of the maintenance, cure and wages count as an incident thereto. Respondent could have split his causes of action into two separate cases. Instead, as was his right, he chose to join them in one case and assert all his claims at one time. Petitioners should appreciate the fact that they were spared the expense and trouble of a second suit.

IV.

THE CIRCUIT COURT OF APPEALS HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THIS IS NOT A CASE WHICH CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Under this point, petitioners assail the evidence and the instructions. But a review of the evidence will

clearly establish the fact that it supports the jury's verdict, and that the trial Court did not err in its rulings on evidence.

The rule on sufficiency of the evidence to sustain a jury finding in a Jones Act case is stated in

Reskin v. Minnesota Atlantic Transit Co. (C.C. A. 2, 1940), 107 Fed. (2d) 743, 744, 1940 A.M.C. 111, 112,

"The sufficiency of the evidence as a basis for the verdict is to be tested by taking as the standard whatever facts the jury might reasonably have found which were supported by substantial evidence together with such reasonable inferences therefrom as might have been drawn."

And see

Armit v. Loveland (C.C.A. 3, 1940), 115 Fed. (2d) 308, 314.

Dr. Gallant's testimony of respondent's history was not hearsay, because it was not admitted for the purpose of proving the truth thereof, but rather as a basis for the doctor's opinion. This was proper.

The rule is stated in

Boyd v. Indus. Comm. of Utah (1935), 88 Utah 184, 48 Pac. (2d) 498, 501,

"Statements made to the attending physician which could aid or reasonably tend to aid in determining the nature of the injury, the nature of its cause, and thus more easily diagnose the case or to discover or interpret symptoms are admissible. These rest logically upon the necessity of the case. It is matter proper to be shown and not susceptible generally of being otherwise proven."

To the same effect:

Davis v. Renton (1931), 113 Cal. App. 561, 298 Pac. 113;

Rohner v. Cross (1932), 121 Cal. App. 667, 9 Pac. (2d) 509;

Sherwood v. Thomas (1932), 124 Cal. App. 450, 12 Pac. (2d) 676;

U. S. v. Tyrakowski (C.C.A. Ill., 1931), 50 Fed. (2d) 766;

Travelers Ins. Co. v. Person (C.C.A. Neb., 1932), 58 Fed. (2d) 210.

Petitioners argue on this petition the same points on the evidence which were rejected by the trial Court, the jury, and the Circuit Court of Appeals. Their inability to convince these bodies does not serve as a basis for their obtaining certiorari here.

Similarly, petitioners object to the instructions. But a review of the instructions will establish the fact that the jury was fully and fairly instructed on all the applicable issues of the case. The Circuit Court of Appeals so found.

DeZon v. American President Lines, supra;

Anelich v. "The Arizona", supra;

Cortes v. Baltimore Insular Lines, supra;

"The Iroquois", supra;

Beadle v. Spencer (1936), 298 U. S. 124, 80 L. Ed. 1082, 56 S. Ct. 712;

Rooker v. Alaska S. S. Co. (1936), 185 Wash. 71, 53 Pac. (2d) 295, cert. den. 299 U. S. 552;

Socony-Vacuum Oil Co. v. Smith (1939), 305 U. S. 424, 83 L. Ed. 265, 59 S. Ct. 262.

V.

THE FACT THAT COUNSEL FOR PETITIONERS HAS ANOTHER CASE PENDING ON CERTIORARI (LUKSICH v. MISETICH) IS NO BASIS FOR GRANTING CERTIORARI IN THIS CASE.

Respondent has not been furnished with nor has he read the record in the *Luksich* case, nor is he in any way familiar with that case. It is rather a novel experience to be presented with a brief in a case with which one has no connection and have that fact urged as the basis for allowing certiorari in a case in which one is interested.

It appears, however, from a perusal of Mr. Gallagher's brief in the *Luksich* case that he is still laboring the point of what kind of an *election* a seaman has as between the seaman's right to bring an action for damages under the Jones Act based on negligence, or under the general maritime law for unseaworthiness, and the cumulative remedy to maintenance, cure and wages. We have discussed this matter in detail under Point I, and see nothing more in the *Luksich brief* which would impel this Court to grant certiorari *here* because of what may or may not be involved there.

Unlike Mr. Gallagher, counsel for respondent finds no confusion in the cases on this question of a seaman's election, but feels that the law as enunciated by this Court on these matters is quite clear and easily understood.

CONCLUSION.

Respondent respectfully submits that petitioners have not brought themselves within the rule of this Court which would cause the issuance of a writ of certiorari and that this petition therefor should be disallowed.

Dated, San Francisco, California,
May 22, 1944.

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